United Nations A/CN.9/1134

General Assembly

Distr.: General
23 May 2023

Original: English

United Nations Commission on International Trade Law
Fifty-sixth session
Vienna, 3–21 July 2023

Report of Working Group VI (Negotiable Multimodal Transport Documents) on the work of its forty-second session (New York, 8–12 May 2023)

Contents

		Page
I.	Introduction	2
II.	Organization of the session	2
III.	Deliberations	3
IV.	Future instrument on negotiable cargo documents	3
	A. General remarks	3
	B. Preliminary draft provisions for an instrument on negotiable cargo documents	4
	1. Draft Article 13. Delivery of goods	4
	2. Draft Article 5. Conditions for use and effect of negotiable electronic cargo records	5
	3. Draft Article 2. Definitions	6
	4. Draft Article 3. Issuance of a negotiable cargo document	10
	5. Draft Article 4. Content of the negotiable cargo document	16

V.23-09704 (E) 240523 250523

I. Introduction

1. At its forty-first session (Vienna, 28 November–2 December 2022), the Working Group took up new work towards the development of a new instrument on negotiable cargo documents referred to it by the Commission.[1] At that session, the Working Group commenced its initial consideration of the new topic on the basis of a note by the Secretariat (A/CN.9/WG.VI/WP.96) containing an annotated set of preliminary draft provisions for an instrument on negotiable cargo documents. The Working Group considered draft articles 3, 4 and 7–12 and reserved deliberations on the other draft articles for a future session.[2]

II. Organization of the session

2. The Working Group, which was composed of all States members of the Commission, held its forty-second session in New York from 8 to 12 May 2023.

3. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Belarus, Brazil, Canada, Chile, China, Côte d'Ivoire, Croatia, Czechia, Democratic Republic of the Congo, Dominican Republic, Finland, France, Germany, Greece, Hungary, India, Iran (Islamic Republic of), Iraq, Italy, Japan, Malawi, Mauritius, Mexico, Morocco, Nigeria, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, Türkiye, Uganda, Ukraine, United States of America, Venezuela (Bolivarian Republic of) and Viet Nam.

4. The session was attended by observers from the following States: Azerbaijan, Bahrain, Burkina Faso, Myanmar, Nepal, Oman, Paraguay, Philippines, Slovakia, Sri Lanka and Uruguay.

5. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: United Nations Conference on Trade and Development (UNCTAD), United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), United Nations Economic Commission for Europe (UNECE) and Universal Postal Union (UPU);

(b) *Intergovernmental organizations*: Gulf Cooperation Council (GCC), Hague Conference on Private International Law (HCCH), Intergovernmental Organization for International Carriage by Rail (OTIF) and Organization for Cooperation between Railways (OSJD);

(c) *International non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), China Council for the Promotion of International Trade (CCPIT), Comité Maritime International (CMI), European Shippers' Council (ESC), International and Comparative Law Research Center (ICLRC), International Federation of Freight Forwarders Associations (FIATA), International Rail Transport Committee (CIT), New York State Bar Association (NYSBA) and Shanghai Arbitration Commission (SHAC).

6. The Working Group elected the following officers:

Chairperson: Ms. Beate CZERWENKA (Germany)

Rapporteur: Ms. Nak Hee HYUN (Republic of Korea)

7. The Working Group had before it the following documents:

(a) An annotated provisional agenda (A/CN.9/WG.VI/WP.97); and

[1] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), paras. 22 (h) and 202.

[2] A/CN.9/1127, para. 9.

(b) A revised annotated set of preliminary draft provisions for an instrument on negotiable cargo documents (A/CN.9/WG.VI/WP.98).

8. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Future instrument on negotiable cargo documents.
5. Adoption of the report.

III. Deliberations

9. The Working Group continued its consideration of the topic on the basis of a note by the Secretariat (A/CN.9/WG.VI/WP.98) containing a revised annotated set of preliminary draft provisions for an instrument on negotiable cargo documents. The summary of deliberations of the Working Group may be found in chapter IV below.

IV. Future instrument on negotiable cargo documents

A. General remarks

10. The Working Group started its deliberations by considering whether the scope of application of the draft new instrument should be limited to situations where the negotiable cargo document was issued by the transport operator acting as a contractual carrier, but not where the transport operator also performed at least part of the carriage under the transport contract as actual carrier.

11. There was some support for a limited scope of application, since the issuance in parallel of a negotiable cargo document (by the contractual carrier) and of a transport document (by the actual carrier) would better reflect the dual-track approach adopted by the draft new instrument. It was noted that permitting actual carriers to issue a negotiable cargo document might create conflict with existing international conventions governing transport of goods, on the basis that both the consignee named under the transport document and the holder of a negotiable cargo document could claim delivery of goods. The prevailing view, however, favoured a broader scope for the draft new instrument, since limiting its application to negotiable cargo documents issued by contractual carriers that did not perform any segment of the carriage would in practice make the draft new instrument only relevant for freight forwarders. It was pointed out that certain relevant international conventions, such as the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention), would cover both the person who concluded and performed the transport contract and the person who only concluded the contract. In the railway context, it was explained that the notion of “carrier” would include contractual carrier, successive carrier and substitute carrier (similar to actual carrier). Contractual carriers and successive carriers would become a party to the transport contract but might or might not perform the carriage themselves. Railway carriers could also be freight forwarders and should not be forced to establish a subsidiary company to act as freight forwarders for the purpose of issuance of a negotiable cargo document. The need for the draft new instrument to function as an enabling instrument and to be flexible for use in other modes of transport was highlighted. While the COTIF-CIM Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM Uniform Rules) contained a provision forbidding a transport document to function as a negotiable document, that provision did not prohibit the issuance of a separate negotiable document. Some delegates also noted that a broader scope of application would still comply with applicable domestic laws.

12. A query was raised as to whether a negotiable cargo document could be issued by a person who organized the carriage of goods but did not conclude a transport contract within the meaning of certain national laws, such as the "commissionaire de transport". It was explained that the intention of the draft new instrument was for a negotiable cargo document to be issued by freight forwarders acting as contractual carriers, not as agents.

13. A suggestion was made to delete the phrase "with the consignor" in the definition of "transport operator", noting that the definition of "consignor" was very broad and might not be the person who concluded the contract. The Working Group agreed to consider it at its next review of the definitions in draft article 2.

14. After discussion, the Working Group agreed that the scope of application of the new instrument should not be limited to contractual carriers who did not perform the carriage themselves.

B. Preliminary draft provisions for an instrument on negotiable cargo documents

1. Draft Article 13. Delivery of goods

Paragraph 2

15. The Working Group was reminded that paragraph 2 derived from the long-standing practice in the maritime sector to issue maritime bill of lading in three originals. As regards the choice between the two sets of square brackets, it was observed that, although similar, they reflected two different legislative policy options. The second sentence positively affirmed the carrier's right to deliver against the production of only one original of the transport document, where more than one original was issued. The first sentence, in turn, provided that the carrier could be released by delivering goods against the production of one original only if it did so "in good faith". Concerns were expressed regarding the notion of "good faith" in that context, given its legal ambiguity, and with the underlying assumption that the surrender of all originals should be the norm. There was, therefore, wide support for extending the practice in the maritime sector to the issuance of negotiable cargo documents in order to avoid interference with existing practice. After discussion, the Working Group agreed to delete the first sentence within square brackets and retain the second sentence without square brackets.

Paragraph 3

16. A query was raised as regards the phrase "in a manner that is customary at the place of delivery" considering that a negotiable cargo document would be a new instrument and thus no custom would have been developed. The need for the holder to acknowledge receipt of the goods was also questioned. In response, the practical importance for the transport operator to receive an acknowledgement from the holder was noted. It was also explained that such an acknowledge would only be necessary upon request of the transport operator. After discussion, the Working Group agreed to delete the phrase "in a manner that is customary at the place of delivery".

Paragraph 4

17. The reference to the "law applicable to the transport contract" was felt to be inadequate, as there were laws and rules other than those solely concerning transport contract which would be relevant for the delivery of goods. The CIM Uniform Rules were cited as an example, which introduced a broader notion to capture rules in place at the destination. The need for paragraph 4 was also questioned, particularly in view of draft article 1, which provided in paragraph 2 that the draft new instrument did not affect the application of any international convention or national law relating to the regulation and control of transport operations, and in paragraph 3 that the draft new instrument did not modify the rights and obligations of the transport operator,

consignor and consignee and their liability under applicable international conventions or national law. A view was, however, expressed against deleting paragraph 4 at this stage. After discussion, the Working Group agreed to place paragraph 4 within square brackets.

2. Draft Article 5. Conditions for use and effect of negotiable electronic cargo records

General comments

18. A concern was expressed that the issues dealt with in the draft article, which to some extent mirrored provisions from the UNCITRAL Model Law on Electronic Transferable Records (MLETR) did not lend themselves for uniform treatment in an international convention, which afforded the contracting States little flexibility to adapt its provisions to the domestic legal system. A better alternative would be to deal with those issues only to the minimum extent necessary and, in any event, to follow the approach of the MLETR and craft provisions intended only to ensure functional equivalence. In response, the Working Group was reminded that it had not yet made its final decision on the form of the new instrument. Moreover, it was noted that the issue concerning electronic transport documents had been previously dealt with in international conventions, such as the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) and the additional Protocol to CMR concerning the Electronic Consignment Note (e-CMR). Since an international convention needed to provide a self-contained legal regime and – unlike a model law – could not assume the existence of supplementary domestic legislation for some key issues, a drafting approach strictly based only on providing the parameters for functional equivalence would be insufficient to ensure the convention's proper operation.

19. Another concern was that draft article 5 did not strictly follow the approach in MLETR. It was thus suggested that the new instrument should include only a general discussion on the approach, refer to applicable domestic law and encourage the adoption of MLETR. In response, it was explained that draft article 5 was largely inspired by the MLETR, and deviations were intended to adapt MLETR to the context of the negotiable electronic cargo record instituted by the draft new instrument and were based on relevant provisions of the Rotterdam Rules and e-CMR. There was general support for retaining detailed provisions on negotiable electronic cargo records, noting that such an approach would be forward-looking and responsive to the practical needs for the electronic version of a negotiable cargo document in the field (particularly when goods travelled faster than paper documents). Examples cited in this context included electronic FIATA Multimodal Transport Bill of Lading and electronic CIM/SMGS consignment records. It was noted that clarify on the use of negotiable electronic cargo records in the new instrument would be essential for the trading and finance industries.

Paragraph 1

20. A suggestion for the chapeau to include a phrase "where the law requires or permits" did not receive sufficient support. The Working Group acknowledged that the proposed formulation, derived from the MLETR and previous UNCITRAL texts on electronic commerce, reflected the time-tested test of functional equivalence. That test was, however, inadequate in the context of the draft new instrument, which was aimed at creating a new type of trade document for which no existing law could serve as a basis for functional equivalence.

21. It was also observed that the second sentence of paragraph 1 combined an affirmative rule on the legal effect of the negotiable electronic cargo record with a non-discrimination provision, and subjected both aspects to the fulfilment of a number of conditions using a reliability test. There was support for the view that the draft article should adopt a more analytical structure and distinguish more clearly what was strictly needed for the new electronic cargo record to function, what could

be achieved merely by non-discrimination and functional equivalence rules, and which of those specific elements should be subject to a reliability test. This might involve breaking down the draft article into several paragraphs and moving some of its contents to separate provisions.

22. Some delegations questioned the application of reliable standards to subparagraph (b), noting that neither article 8 nor article 10.1 (a) of MLETR was subject to a reliable method. Some other delegations pointed out that reliable standards would be essential in the light of any requirement to enter subsequent instructions to the carriers in the negotiable electronic cargo record itself. Consideration should also be given to the question of who needed to access the negotiable electronic cargo record. It was clarified that article 8 and article 10.1 (a) of MLETR included an absolute standard, and, for article 8, a higher one than the reliability standard.

23. A view was expressed that subparagraph (b) could be divided into two parts. The first part concerning the requirement to record all information required by article 4 was unnecessary as already implied in draft article 4. The second part referring to "accessible so as to be usable for subsequent reference" could be integrated in the definition of "electronic record" under draft article 2. In response, it was emphasized that article 4 would apply to both paper and electronic versions by operation of the last sentence in the definition of "negotiable cargo document". It was also noted that none of UNCITRAL instruments on electronic commerce had integrated the functional equivalence rule into the definition of "electronic record". However, it was pointed out that that notion was integrated in the definition of "electronic communication" in article 1 (17) of the Rotterdam Rules.

24. In the context of subparagraph (c), a question was raised as to whether a definition of "exclusive control" would be necessary. In response, it was explained that the notion of "control" was used as equivalent to physical possession and MLETR did not define the term "exclusive control".

25. Turning to subparagraph (d), the Working Group heard a suggestion for it to follow the approach of article 11 of MLETR and to address the issue of control in a separate paragraph. Another suggestion was made for addressing the issue of control as a functional equivalence to possession in the definition of "holder" under draft article 2 which already mentioned "possession". In response, references were made to different approaches for linking "possession" and the definition of "holder" used in the Rotterdam Rules.

26. Queries were raised as to whether the draft new instrument should include any rules on endorsement including, for example, how would endorsement take place in an electronic context. The Working Group was reminded that it had not yet made a final decision as to whether a bearer negotiable cargo document should be allowed. As a result, the phrase "including by endorsement or to the bearer" remained within square brackets.

27. The Working Group agreed to postpone its consideration of draft provisions on electronic aspects and revisit them after finalizing the substantive provisions concerning negotiability. The Working Group recalled that it had completed a first reading of all substantive provisions except for draft articles 1 and 2.

3. Draft Article 2. Definitions

Paragraph 1 ("Actual carrier")

28. The Working Group noted that the term "actual carrier" only appeared once in the draft new instrument, namely in draft article 3, paragraph 3. It was generally understood that the purpose of that paragraph was to clarify that the issuance of a negotiable cargo document would not interfere with the issuance of any transport document required under the law applicable to the transport contract or the terms of the contract. Given that the Working Group had decided that the scope of application of the draft new instrument should not be limited to contractual carriers who did not

perform the carriage themselves (see para. 14 above), the definition of "transport operator" would cover any person who concluded a transport contract irrespective of whether or not that person performed the carriage itself. It was pointed out that reference to any transport document issued by any actual carrier would not be consistent with the definition of "transport document" which referred only to the issuance by the transport operator. Therefore, the need for distinguishing the transport operator and any actual carrier in the first sentence of draft article 3, paragraph 3 was questioned. The Working Group agreed to delete the reference to "actual carrier" in that sentence and also delete the definition of "actual carrier" as such term would no longer appear in the draft new instrument.

29. There was some support for the view that the first sentence in draft article 3, paragraph 3, was not necessary and that both sentences could be combined. In response, it was noted that the two sentences dealt with different notions: the relationship between the negotiable cargo document and any transport document required to be issued, on the one hand, and any other documents that might be connected with international transport, possibly at later stage of its performance. Although the interrelation between the draft new instrument and any international convention or national law concerning the transport of goods had already been addressed in draft article 1, paragraph 2, the Working Group believed that draft article 3, paragraph 3, served an important purpose of regulating the co-existence of a negotiable cargo document and a transport document. It was observed that the draft new instrument should not only clarify that the negotiable cargo document did not replace transport documents required to be issued under mandatory law, but also that it preserved the possibility of using also other types of documents used in practice without being required by law, such as freight forwarders' standard trading terms and conditions. Another suggestion for draft article 3, paragraph 3 to incorporate wording from the second sentence in article 13 of the United Nations Convention on International Multimodal Transport of Goods (the "MT Convention") also did not receive sufficient support.

Paragraph 2 ("Consignor")

30. The Working Group agreed to limit the definition of "consignor" to the person who concluded the transport contract with the transport operator, noting, however, that the draft new instrument should take into consideration the three entities often involved in the sales contract, namely the person who concluded the transport contract, the person named in transport document and the person who delivered the goods to the transport operator. It was explained that the right for the consignor to consent to the issuance of a negotiable cargo document under draft article 3, paragraph 1, would justify a narrow definition of "consignor".

31. The Working Group also agreed to delete the phrase "or in whose name or on whose behalf", since questions of agency and legal representation were typically dealt with in domestic laws.

Paragraph 3 ("Consignee")

32. A concern was expressed about defining consignee as the person "entitled to take delivery of the goods", considering that only the holder of a negotiable cargo document would be entitled to take delivery. It was suggested that the definition should be revised to refer to the person entitled to take delivery of the goods "under a transport contract or transport document". Another suggestion was to introduce the notion of "original consignee".

33. The Working Group revisited this definition after examining the definition of "holder" and agreed to revise the definition along the lines of: "consignee is the person named in the transport contract as the person entitled to take delivery of the goods." It was emphasized that the nomination of consignee was usually left for the consignor. The Working Group also agreed to reconsider draft article 9, paragraph 1,

subparagraph (c), regarding the right of the holder to replace the consignee at a later stage.

Paragraph 4 (“Holder”)

34. While some delegations suggested that the concept of “exclusive control” should be reflected in the definition of “holder” as being equivalent to possession in the context of negotiable electronic cargo records, the prevailing view was, however, that the draft new instrument should include a separate section on electronic aspects which would also discuss the conditions under which the requirement for possession would be met in an electronic context. It was noted that introducing the concept of “exclusive control” in the definition of “holder” would make such definition unnecessarily complicated.

35. The difficulty of defining “endorsement” in an electronic context was also highlighted, noting that the concept of “duly endorsed” might be equivalent to “duly transferred”. Reference was made to article 15 of MLETR dealing with endorsement. The Working Group agreed that a separate section on electronic aspects in the draft new instrument should also provide for the functional equivalence rule for endorsement. For purposes of drafting, the Working Group was invited to consider the definition of “holder” in the draft Model Law on Warehouse Receipts prepared by a joint UNIDROIT/UNCITRAL working group.

36. Considering that the Working Group had not yet made a decision on bearer documents, it was agreed that the last phrase should be retained within square brackets at this stage.

37. There was no support for a suggestion that the draft new instrument should introduce rules on endorsement (e.g. a requirement for uninterrupted series of endorsement).

Paragraph 5 (“International transport of goods”)

38. The Working Group agreed to delete the definition as the term “international transport of goods” was generally well understood and could be clearly inferred from draft article 1, paragraph 1. In response to a query as to the effect of the words “as provided for in the transport contract”, it was observed that the draft new instrument should apply to any transport of goods which had an international character at the time of conclusion of the transport contract, regardless of subsequent changes in the place of delivery which would change the international character.

Paragraph 6 (“Negotiable cargo document”)

39. A suggestion was made to replace the phrase “the law applicable to the document” with “the law applicable to the transport contract”. In response, it was explained that that phrase referred to the applicable law for determining whether any other appropriate wording would be recognized as having the same effect as “to order” or “negotiable”. Another suggestion was made to delete that phrase on the basis that the draft new instrument should provide for an exhaustive list of examples of appropriate wording and not leave it to national laws to decide. After discussion, the Working Group agreed to delete the phrase “or other appropriate wording recognized as having the same effect by the law applicable to the document” and replace it with the words “or an equivalent expression”.

40. The Working Group did not take up the suggestion to delete the reference to “signed by the transport operator” at this stage, noting that such reference had been inserted to reflect its previous deliberations (see A/CN.9/1127, para. 57), and that signature was considered as an essential element in order for a document to be recognized as a negotiable document. The need to ensure consistency between that phrase and draft article 4, paragraph 1, was highlighted, as the latter provided that the negotiable cargo document should be signed by the transport operator or a person acting on its behalf.

41. A concern was raised about the requirement for a negotiable cargo document to indicate that "goods have been received by the transport operator", given that in practice goods were typically not physically received by freight forwarders themselves. While the Rotterdam Rules referred to the concept of "receipt" of goods, that concept was used to refer to receipt of goods not only by the carrier but also by a performing party. Several suggestions were made to address that concern, including (a) introducing the notion of "custody" as being important for the purpose of proving delivery of goods; (b) specifying that the goods had been received by the transport operator or any other person on its behalf; and (c) replacing the term "receive" with the phrase "taking in charge" as used in the UNCTAD/ICC Rules on Multimodal Transport Documents and the Negotiable FIATA Multimodal Transport Bill of Lading. While some support was expressed for the first two suggestions, the Working Group agreed that the definition should refer to the goods being "taken in charge" by the transport operator since such term and iterations thereof appeared in documents widely used by the relevant industries. The importance for the transport operator to secure custody of the goods was nevertheless emphasized. For consistency, the Working Group also requested the secretariat to replace the term "receive" with "taking in charge" in other relevant provisions of the draft new instrument.

42. The Working Group further agreed to delete the phrase "and is not explicitly stated as being 'non-negotiable' or 'not negotiable'", since the draft new instrument would only deal with negotiable documents.

43. In line with its decision to postpone the consideration of draft provisions on electronic aspects (see para. 27 above), the Working Group deferred its consideration of the second sentence of paragraph 6 as well as paragraphs 7 to 9 of draft article 2.

Paragraph 10 ("Transport contract")

44. Concerns were expressed about the phrase "against payment of freight" on the grounds that (a) such phrase might exclude certain logistics contracts thereby limiting the scope of application of the draft new instrument; and (b) in practice a transport contract concluded with freight forwarders might include a single price quote for all types of services to be provided without specifying freight. Support was expressed for a more generic term "for reward" as contained in existing international conventions concerning the transport of goods by railway, road and air. While the type of remuneration was not considered relevant for the purpose of the definition, the need to reflect the notion of "freight" in draft article 4, paragraph 2, subparagraph (h) was emphasized. Reference was made to the term "charges relating to the carriage of goods" used in the CMR Convention. Reference was also made to the requirement under certain contracts (e.g. contracts on CIF terms) that bills of lading be marked "freight prepaid".

45. Another concern regarded the phrase "to procure the performance", which might be interpreted as referring to freight forwarders acting as agents, not as contractual carriers. It was explained that in practice freight forwarders could act as contractual carriers, as agents or both. It was generally understood that the transport operator should only be able to issue a negotiable cargo document if it was in the position of a carrier acting under a transport contract and in possession of the goods.

46. A query was raised as to the reason for a definition of "transport operator" instead of "carrier", since the latter would be generally well understood. In response, it was noted that such definition was inspired by the definition of "multimodal transport operator" in the MT Convention and that it was intended to capture the diversity of commercial practice such as non-vessel operating carriers and thus broader in scope.

47. The Working Group agreed to revise the definition along the lines of: "transport contract means a contract whereby a transport operator undertakes to perform international transport of goods for reward".

Paragraph 11 (“Transport document”)

48. A suggestion to delete the definition on the basis that such term would already be defined under relevant existing international conventions and domestic laws did not receive sufficient support. It was noted that the purpose of the definition was to address the interaction between the existing regime concerning transport documents and the new regime designed for negotiable cargo documents. The need for such definition was also justified as it appeared multiple times in the draft new instrument. It was clarified that in the current version of the draft new instrument the term “transport document” was intended to refer to those issued by the transport operator, which contained key information about the transport contract that would be reproduced in a negotiable cargo document.

49. Another suggestion to shorten the definition to read “transport document means a document issued according to a transport contract” also did not receive sufficient support. The importance of the elements described in subparagraphs (a) and (b) for a negotiable cargo document was highlighted, considering that a transport document might serve as the negotiable cargo document by inserting appropriate annotation on the face of the transport document. The Working Group was reminded that the Rotterdam Rules contained two closely linked definitions for “negotiable transport document” and “transport document”.

50. Some support was expressed for the suggestion to reverse the order of subparagraph (a) and subparagraph (b) in order to reflect the logical sequence of events.

51. After discussion, the Working Group agreed to retain the current wording except for replacing the term “receipt” as previously agreed (see para. 41 above). The Working Group also requested the secretariat to include a new definition based on article 1 (4) of the MT Convention as an additional option for consideration by the Working Group at its next session, which would read along the lines of: “transport document means a document that evidences a transport contract, the taking in charge of the goods by the transport operator, and an undertaking by the transport operator to deliver the goods in accordance with the terms of that contract.”

Paragraph 12 (“Transport operator”)

52. The Working Group recalled its earlier deliberations on this definition when considering the scope of application of the draft new instrument (see paras. 10–14 above). The need for the phrase “who assumes responsibility for the performance of the contract” was questioned as being self-evident. It was, however, noted that the reference to “responsibility” carried particular importance as it correctly reflected the position of a contractual carrier.

53. There was no support for the suggestion to combine the definition of “transport contract” and the definition of “transport operator”, considering that the draft new instrument introduced new concepts.

4. Draft Article 3. Issuance of a negotiable cargo document

General comments

54. As general remarks, it was noted that the dual-track approach adopted by the draft new instrument entailed that the negotiable cargo document would not replace any transport document issued under the transport contract, but did not necessarily require the issuance of two different documents. A distinction was made between the dual-track approach and the dual-document system of the Negotiable FIATA Multimodal Transport Bill of Lading. The latter was more similar to the practice of issuing house and master bills of lading in the maritime sector (see also A/CN.9/1127, para. 92).

55. A suggestion to expressly exclude international transport with a sea leg from the scope of application of the draft new instrument did not receive sufficient support,

considering the significance of maritime sector and the high dependence of coastal countries on maritime transport. It was pointed out that non-negotiable transport documents (such as seaway bills) were also used in maritime transport. In response, it was noted that the shipper under a sea carriage evidenced by a seaway bill retained the right to demand the issuance of a negotiable document at any time and would not rely on the draft new instrument for that purpose. The Working Group agreed that the matter needed further consideration.

Paragraph 1

56. The Working Group took up a suggestion to revise paragraph 1 along the lines of: "The consignor and the transport operator may agree that when the goods are taken in charge by the transport operator, the transport operator shall issue a negotiable document in accordance with the provisions of the Convention."

Paragraph 2

57. Option 1 was viewed as the least suitable option as it offered little protection against the risk of issuance of two negotiable documents by the same transport operator in respect of the same goods. The duplicity of negotiable documents in the market would likely raise concerns among the banking industry and discourage the use of negotiable cargo documents in turn. There was broad support for deleting option 1.

58. As between option 2 and option 3, preference was expressed in favour of option 2 on the basis that under option 3 the transport document could only serve as a negotiable cargo document if it had been issued as a negotiable document. In the view of some delegations, the draft new instrument should not impede the use of a non-negotiable transport document as a negotiable cargo document if allowed under domestic laws. In this respect, article 6.5 of the CIM Uniform Rules was cited as the only known example which explicitly prohibited a consignment note to have the effect as a bill of lading. If that was the case, the draft new instrument could, as among its States Parties, function as a derogation of that prohibition. In response, the Working Group was urged to avoid the impression that the draft new instrument invited States to adopt provisions that conflicted with their existing treaty obligations. Moreover, even if article 41 of the Vienna Convention on the Law of Treaties admitted agreements to modify multilateral treaties between certain of the parties only, this could not be done tacitly and any such subsequent modifying agreement required the notification of the other Parties to the modified treaty of the intention to conclude a modifying agreement and of the modification to the treaty for which it provided.

59. In respect of option 2, a suggestion was made to revise it to include (a) a default rule that the transport document should serve as a negotiable cargo document by inserting an appropriate reference to the draft new instrument on the face of the transport document, and (b) a fallback rule that, in the event that no transport document had been issued or that domestic laws prohibited the transport document to function as a negotiable document, the negotiable cargo document could be issued as a separate document in addition to the transport document. It was explained that one single document could avoid the issue of potential inconsistency between two different documents and also reduce the number of documents circulated in the market. Doubts were expressed as to the benefits for such a default rule since it would restrict the freedom of choice by the market. A concern was raised that the proposed fallback rule would be burdensome in practice, as it assumed the parties' knowledge about relevant domestic laws. Another concern was that such a default rule would inevitably modify the purpose of the draft new instrument, which would no longer focus on creating a negotiable cargo document but on attributing negotiability function to a pre-existing transport document. A suggestion was also made to clarify in the proposed default rule that the transport document could only serve as a negotiable cargo document if it fulfilled the requirements indicated in the definition of a negotiable cargo document.

60. After reviewing paragraphs 3–6 of draft article 3, the Working Group held an extensive debate on paragraph 2, which was felt to be the core of the draft new instrument. According to a widely shared view, the default rule should be the issuance of a single document functioning both as transport document and negotiable cargo document. Neither of the present options of paragraph 2 made that hierarchy clear, and the sequence in which they were structured might be misread as a preference for the issuance of a separate document. After considering various alternatives, the Working Group was invited to review draft article 3, paragraph 2 in the light of the following proposal:

> "2. Unless the consignor and the transport operator agree otherwise, the transport document shall serve as a negotiable cargo document [for the purposes of this Convention] by inserting an appropriate reference on the face of the transport document.
>
> A separate negotiable cargo document shall not be issued where the transport document is [of itself/already] negotiable."

61. Some support was expressed for that proposal, as it accurately reflected the understanding that (a) upgrading the transport document into a negotiable cargo document would be the default rule; and (b) issuance of two negotiable documents in respect of the same goods would be prohibited. Concerns were, however, expressed that the proposal did not explicitly state when a negotiable cargo document could be issued as a separate document in addition to the transport document. The proposal also did not cover the situation when no transport document had been issued under the transport contract. In addition, the phrase "unless the consignor and the transport operator agree otherwise" might be interpreted as giving parties the discretion to agree on the issuance of a negotiable cargo document in whatever form. It was also noted that a transport document could only serve as a negotiable cargo document if it met all requirements to be met by a negotiable cargo document stated in other provisions of the draft new instrument. Another question was to what extent transport operators might perform international transport of goods without issuing any transport document.

62. In the context of multimodal transport involving several different segments of carriage covered by different transport documents, it was said, there could be doubt as to whether one of these transport documents covering a specific segment of carriage could be upgraded into a negotiable cargo document. In response, it was pointed out that the definition of "transport document" in the draft new instrument excluded those transport documents not issued by the transport operator. From the perspectives of the banking industry, the desirability of a negotiable document covering the whole "door to door" journey was also emphasized.

63. A suggestion was made for an appropriate reference to the draft new instrument to be inserted in the negotiable cargo document issued as a separate document. It was noted that the CIM Uniform Rules required consignment notes to include a statement that the carriage was subject to these Uniform Rules.

64. After discussion, the Working Group agreed to retain the following revised version of paragraph 2 as a basis for further consideration:

> "(a) For the purposes of paragraph 1, a transport document that contains information set out in article 4 shall serve as a negotiable cargo document for the purpose of this Convention by inserting an appropriate reference to this Convention on its face, unless the parties otherwise agree.
>
> (b) Where the parties instead agree not to use the transport document as the negotiable cargo document pursuant to paragraph 2(a), the negotiable cargo document may be issued as a separate document, provided that the transport document referred to in paragraph 2(a) is not a negotiable document."

Paragraph 3

65. At the outset, a query was raised as to whether the draft new instrument envisaged the issuance of more than one negotiable cargo document in the context of multimodal transport covering several unimodal contracts. The Working Group was informed that goods transported from one place subject to CIM Uniform Rules to another place subject to the Agreement on International Railway Freight Communications (SMGS) might be covered by a single consignment note, but each segment of the overall carriage would be subject to its own legal regime. In such a situation, it was asked, would more than one negotiable cargo document need to be issued under different transport contracts concluded by the same transport operator? In response, it was explained that in theory the draft new instrument permitted the issuance of one negotiable cargo document in respect of each transport contract; however, in practice the transport operator would likely conclude only one transport contract with the same consignor to transport the same goods, irrespective of whether or not it intended to perform the carriage itself. The desirability of issuing more than one negotiable cargo document was questioned, noting that banks would be unlikely to accept negotiable cargo documents that covered only a segment of a journey for which other negotiable cargo documents might also have been issued as adequate security for financing purposes.

66. Turning to the wording of paragraph 3, the Working Group recalled its decision to delete the reference to "actual carrier" in the first sentence when considering the definition of "actual carrier" (see para. 28 above). A suggestion to replace the reference to "any transport document" in the first sentence with a broader term "any other documents relating to transport or other services involved in international transport of goods" as contained in the second sentence did not receive sufficient support. Some delegations expressed a concern about the term "substitute" since it might imply that a negotiable cargo document had been issued as a separate document in addition to the transport document, on which the Working Group had not yet made a decision.

67. Another suggestion to delete the second sentence as being redundant in the light of draft article 1, paragraphs (2) and (3) did not receive sufficient support. It was reiterated that that sentence preserved the possibility of using other types of documents used in practice without being required by law, such as freight forwarders' standard trading terms and conditions. The need for the Working Group to revisit this sentence after discussing draft article 1, paragraphs (2) and (3) was emphasized.

68. After discussion, the Working Group agreed to (a) revise the first sentence to state that the negotiable cargo document issued as a separate document would not substitute any transport document which the transport operator may be required to issue, and (b) retain the second sentence in its current form and revisit at a later stage.

Paragraph 4

69. A concern was raised as to the phrase "in addition to an airway bill, a road consignment note or a railway consignment note", noting that such phrase excluded other non-negotiable transport documents (e.g. seaway bills). The need for this paragraph to provide an exhaustive list of non-negotiable transport documents was questioned, considering that new types of transport documents might appear as new practices develop. Support was expressed for replacing that phrase with "in addition to a non-negotiable transport document".

70. The Working Group was cautioned against linking the validity of a negotiable cargo document to the existence of a corresponding annotation in the transport document. In practice, it would be difficult for the holder of a negotiable cargo document (e.g. banks) to verify the annotations in all copies of the transport document, which would inhibit the negotiability and financing function of a negotiable cargo document. It was generally felt that paragraph 4 could be revised to impose an obligation on the transport operator to enter annotations in the transport document, even though some delegations noted that transport operators might not

wish to assume greater liabilities since the consignor would be responsible for entries in the consignment notes under certain relevant existing international conventions (e.g. CIM Uniform Rules). In the view of some other delegations, imposing such obligation on the transport operator would be considered commercially reasonable because the issuance of a negotiable cargo document as a separate document would be an additional service provided by the transport operator at a cost. It was added that such obligation would not be too burdensome as a negotiable cargo document would likely be issued simultaneously with the transport document or immediately after. Invalidating the negotiable cargo document seemed, however, too harsh a consequence, and it might suffice for the draft new instrument to require the transport operator to enter such annotations in the transport document without specifying the consequences for failure to do so. While the draft new instrument did not intend to address liability issues, the Working Group was reminded that a breach of the transport operator's obligation to enter annotations would nevertheless make it liable for the breach.

71. Another concern related to the reference to all "copies" of the "transport document", which might be interpreted as excluding originals of the transport document and also transport documents issued by subcontractors for specific segments of a multimodal carriage. In response, it was pointed out that the definition of "transport document" was meant to cover only those issued by the transport operator, not by subcontractors, and thus the draft new instrument should not require annotations to be made in the transport documents issued by subcontractors. Support was expressed for deleting the phrase "all copies of" since existing conventions concerning transport of goods did not use the term "original" and "copy" in the same manner.

72. After discussion, the Working Group agreed to revise the paragraph along the lines of: "the transport operator who issues a negotiable cargo document as a separate document in addition to a non-negotiable transport document shall acknowledge the issuance of such negotiable cargo document by inserting a corresponding annotation in the transport document."

Paragraph 5

73. Support was expressed for the issuance of bearer documents, on the ground that banks would typically not wish to be named as consignee on the face of a negotiable document. A suggestion to delete the phrase "or to order of a named person" as the issue was already addressed in the second sentence did not receive support, since it was considered desirable for the first sentence to list different types of negotiable document. While some delegations suggested deleting the second and third sentences and leaving such issues to domestic laws, others were of the view that the draft new instrument should provide a solution. The Working Group was reminded of the diverse treatment given in different jurisdictions to bills of lading made out "to order" without indicating a named person. The rule that the negotiable cargo document should be deemed to be made out to the order of the consignor when the name was not indicated was questioned. The Working Group agreed to retain the phrases within square brackets at this stage.

Paragraph 6

74. A preference was expressed for option 1, on the understanding that indicating the number of originals in a negotiable cargo document would be consistent with commercial practice. It was noted that banks would typically require the presentation of a full set of originals of bills of lading in letter of credit transactions. Although draft article 4, paragraph 2, subparagraph (g) also required the number of originals to be specified in the negotiable cargo document, it was noted that that subparagraph served a different purpose as a checklist for the content of the negotiable cargo document. The Working Group agreed to retain option 1 and delete option 2.

5. Draft Article 4. Content of the negotiable cargo document

Paragraphs 1 and 2

75. The Working Group agreed to merge paragraphs 1 and 2 into one single mandatory list without indicating which information was reproduced from the transport contract. Considering that the Working Group had agreed on a default rule for a transport document to serve as a negotiable cargo document under certain conditions, support was expressed for inserting a new paragraph to read along the lines of: “A negotiable cargo document that is issued as a separate document in accordance with article 3, subparagraph 2 (b), shall reproduce the particulars indicated in paragraphs 1 as stated in the transport document.”

76. In respect of the chapeau of paragraph 1, the need for the requirement for a negotiable cargo document to be signed by the transport operator was questioned, noting that the definition of “negotiable cargo document” in draft article 2, paragraph 6, already contained such a requirement. The Working Group agreed to replace the word “signed” by “issued” in the definition of “negotiable cargo document” and to merge the chapeau of paragraphs 1 and 2 to read along the lines of: “the negotiable cargo document shall be signed by the transport operator and shall indicate:”.

77. It was pointed out that paragraph 2, subparagraphs (a) and (b), concerned the general nature and condition of the goods as factual statements, rather than as information in the transport contract. In that connection, the Working Group considered a proposal to delete the phrase “all such particulars as furnished by the consignor”. It was said that the draft new instrument should avoid substantive law questions, such as to what extent the transport operator might qualify any of the information furnished by the consignor and should leave them to the law applicable to the transport contract. After discussion, the Working Group requested the secretariat to revise subparagraph (a) to include a phrase “[as taken in charge by the transport operator]” after the phrase “the general nature of the goods” and place the phrase “all such particulars as furnished by the consignor” within square brackets for further consideration by the Working Group.

78. It was generally understood that the validity of a negotiable cargo document as referred to in draft article 7, paragraph 1, would be linked to those mandatory requirements listed in draft article 4, on which the Working Group had not yet made a decision during the session. The view was expressed that the validity of a negotiable cargo document should not be affected in case of inconsistency between the negotiable cargo document and the transport document.